

DOROTEO R. RIVERA,
Plaintiff,
v.
MICHAEL J. ASTRUE, Commissioner
of Social Security,
Defendant.

No. CV-10-0315-CI
ORDER DENYING PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT
AND GRANTING DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT

BEFORE THE COURT are cross-Motions for Summary Judgment (ECF No. 13, 18.) Attorney Jeffrey Schwab represents Doroteo Rivera (Plaintiff); Special Assistant United States Attorney L. Jamala Edwards represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. (ECF No. 6.) After reviewing the administrative record and briefs filed by the parties, the court **DENIES** Plaintiff's Motion for Summary Judgment, and directs entry of judgment for Defendant.

Plaintiff protectively filed for disability insurance benefits (DIB) and supplemental security insurance (SSI) on July 2, 2007. (Tr. 128.) He alleged disability due to arthritis in his back, with an onset date of October 4, 2006. (Tr. 127. 132.) His claim was denied initially and on reconsideration. Plaintiff requested a hearing before an administrative law judge (ALJ), which was held on September 29, 2009, before ALJ Louis J. Volz, III. (Tr. 20.)

1 Plaintiff, who was represented by counsel, and vocational expert
2 Daniel R. McKinney, Sr., (VE) testified. (Tr. 31-71.) An
3 interpreter also was present at the hearing. The ALJ denied
4 benefits on January 22, 2010, and the Appeals Council denied review.
5 (Tr. 20-27, 6-9.) The instant matter is before this court pursuant
6 to 42 U.S.C. § 405(g).

7 STANDARD OF REVIEW

8 In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001), the
9 court set out the standard of review:

10 A district court's order upholding the Commissioner's
11 denial of benefits is reviewed *de novo*. *Harman v. Apfel*,
12 211 F.3d 1172, 1174 (9th Cir. 2000). The decision of the
13 Commissioner may be reversed only if it is not supported
14 by substantial evidence or if it is based on legal error.
15 *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999).
16 Substantial evidence is defined as being more than a mere
17 scintilla, but less than a preponderance. *Id.* at 1098.
18 Put another way, substantial evidence is such relevant
19 evidence as a reasonable mind might accept as adequate to
20 support a conclusion. *Richardson v. Perales*, 402 U.S.
21 389, 401 (1971). If the evidence is susceptible to more
22 than one rational interpretation, the court may not
23 substitute its judgment for that of the Commissioner.
24 *Tackett*, 180 F.3d at 1097; *Morgan v. Commissioner of*
25 *Social Sec. Admin.*, 169 F.3d 595, 599 (9th Cir. 1999).

26 The ALJ is responsible for determining credibility,
27 resolving conflicts in medical testimony, and resolving
28 ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th
Cir. 1995). The ALJ's determinations of law are reviewed
de novo, although deference is owed to a reasonable
construction of the applicable statutes. *McNatt v. Apfel*,
201 F.3d 1084, 1087 (9th Cir. 2000).

It is the role of the trier of fact, not this court, to resolve
conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence
supports more than one rational interpretation, the court may not
substitute its judgment for that of the Commissioner. *Tackett*, 180
F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984).

1 Nevertheless, a decision supported by substantial evidence will
2 still be set aside if the proper legal standards were not applied in
3 weighing the evidence and making the decision. *Browner v. Secretary*
4 *of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988). If
5 there is substantial evidence to support the administrative
6 findings, or if there is conflicting evidence that will support a
7 finding of either disability or non-disability, the finding of the
8 Commissioner is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-
9 1230 (9th Cir. 1987).

10 SEQUENTIAL EVALUATION

11 Also in *Edlund*, 253 F.3d at 1156-1157, the court set out the
12 requirements necessary to establish disability:

13 Under the Social Security Act, individuals who are
14 "under a disability" are eligible to receive benefits. 42
15 U.S.C. § 423(a)(1)(D). A "disability" is defined as "any
16 medically determinable physical or mental impairment"
17 which prevents one from engaging "in any substantial
18 gainful activity" and is expected to result in death or
19 last "for a continuous period of not less than 12 months."
20 42 U.S.C. § 423(d)(1)(A). Such an impairment must result
21 from "anatomical, physiological, or psychological
22 abnormalities which are demonstrable by medically
23 acceptable clinical and laboratory diagnostic techniques."
24 42 U.S.C. § 423(d)(3). The Act also provides that a
25 claimant will be eligible for benefits only if his
26 impairments "are of such severity that he is not only
27 unable to do his previous work but cannot, considering his
28 age, education and work experience, engage in any other
kind of substantial gainful work which exists in the
national economy. . . ." 42 U.S.C. § 423(d)(2)(A). Thus,
the definition of disability consists of both medical and
vocational components.

24 In evaluating whether a claimant suffers from a
25 disability, an ALJ must apply a five-step sequential
26 inquiry addressing both components of the definition,
27 until a question is answered affirmatively or negatively
28 in such a way that an ultimate determination can be made.
20 C.F.R. §§ 404.1520(a)-(f), 416.920(a)-(f). "The
claimant bears the burden of proving that [s]he is
disabled." *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir.
1999). This requires the presentation of "complete and

1 detailed objective medical reports of h[is] condition from
2 licensed medical professionals." *Id.* (citing 20 C.F.R. §§
404.1512(a)-(b), 404.1513(d)).

3 The Commissioner has established a five-step sequential
4 evaluation process for determining whether a person is disabled. 20
5 C.F.R. §§ 404.1520(a), 416.920(a); see *Bowen v. Yuckert*, 482 U.S.
6 137, 140-42 (1987). In steps one through four, the burden of proof
7 rests upon the claimant to establish a prima facie case of
8 entitlement to disability benefits. *Rhinehart v. Finch*, 438 F.2d
9 920, 921 (9th Cir. 1971). This burden is met once a claimant
10 establishes that a physical or mental impairment prevents him from
11 engaging in his previous occupation. 20 C.F.R. §§
12 404.1520(a)(4)(iv), 416.920(a)(4)(iv). At step five, the burden
13 shifts to the Commissioner to show that (1) the claimant can perform
14 other substantial gainful activity; and (2) a "significant number of
15 jobs exist in the national economy" which claimant can perform. 20
16 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v); *Kail v. Heckler*, 722
17 F.2d 1496, 1498 (9th Cir. 1984).

18 STATEMENT OF THE CASE

19 The facts of the case are set forth in detail in the transcript
20 of proceedings, and are briefly summarized here. At the time of the
21 hearing, Plaintiff was 50 years old with a sixth grade education.
22 (Tr. 36, 118.) Plaintiff speaks only Spanish, and has past work
23 experience as a laborer and as a pastor. (Tr. 37.) Plaintiff
24 testified he lived with his spouse and eight year old son and could
25 not longer work due to pain and lack of mobility. He stated he
26 could sit for 30 minutes at a time and stand for an hour before he
27 experienced pain. (Tr. 39, 41-42.)

ADMINISTRATIVE DECISION

The ALJ found Plaintiff's date of last insured for DIB purposes was December 30, 2011. (Tr. 20.) At step one, ALJ Volz found Plaintiff had not engaged in substantial gainful activity since the alleged onset date of October 4, 2006. (*Id.*) At step two, he found Plaintiff had the severe impairment of "degenerative disc disease at L5-S1 (arthritis of the back)." (Tr. 23.) He found there was no medical evidence to establish hand or feet weakness as a medically determinable impairment. (*Id.*) At step three, the ALJ determined Plaintiff did not have an impairment or combination of impairments that met or medically equaled one of the listed impairments in 20 C.F.R., Appendix 1, Subpart P, Regulations No. 4 (Listings). (Tr. 23.) In his discussion of the evidence, the ALJ noted that prior to surgery, imaging showed focal disc herniation causing "severe lateral recess stenosis." (Tr. 24.) In his step four discussion, the ALJ found Plaintiff's symptom allegations were not entirely credible to the extent they were inconsistent with the residual functional capacity (RFC) determination. (Tr. 24.) Based on the entire record, ALJ Volz found Plaintiff had the RFC to perform light work "with functional illiteracy or conversant in English language [sic]." (Tr. 24.)

Based on the RFC determination and VE testimony, the ALJ concluded Plaintiff could perform his past relevant work as a pastor/minister and, therefore, was not under a "disability" as defined by the Social Security Act. (Tr. 26.)

ISSUES

The question is whether the ALJ's decision is supported by

1 substantial evidence and free of legal error. Plaintiff argues the
2 ALJ erred when he: (1) failed to call a medical expert at step three
3 to determine if a Listing was met, and (2) failed to include all
4 limitations in the hypothetical question to the VE at step four.
5 (ECF No. 14.)¹

6 DISCUSSION

7 A. Step Three Listing Equivalence

8 Plaintiff first appears to argue that without medical expert
9 testimony, the ALJ's step three findings are not supported by
10 substantial evidence. He contends generally that because his
11 symptoms and medical condition include elements found in the
12 Listings, a medical expert is required. (ECF No. 10 at 11.) This

13
14 ¹ In his opening brief, Plaintiff appears to suggest other
15 severe impairments should have been included at step two.
16 Specifically, he contends the ALJ "overlooked the epidural scarring
17 at the S1 nerve root," "spinal stenosis at the L3-L4," and "moderate
18 to severe vertebral spondylsosis." (ECF No. 14 at 5, *citing* ECF No.
19 10-7 at 97, 107, and 40.) However, the citations to the record in
20 Plaintiff's brief do not correspond with medical evidence of these
21 conditions, and there is no evidence that these conditions persisted
22 after surgery. Without specific and cogent briefing, the court may
23 not consider this argument. *Carmickle v. Comm'r*, 533 F.3d 1155, 161
24 n.2 (9th Cir. 2008). Further, as found by the ALJ, imaging from 2007
25 shows degenerative disc disease at L5, S1, but "no
26 spondylolisthesis, no abnormal subluxation, no acute process." (Tr.
27 25, Tr. 265-67.) The ALJ's step two findings are supported by
28 substantial evidence.

1 argument is without merit. The decision to call a medical expert
2 for additional evidence on the nature and severity of impairments is
3 within the discretion of the ALJ. Testimony from a medical expert
4 is required only "[w]hen . . . in the opinion of the [ALJ] or the
5 Appeals Council the symptoms, signs and laboratory findings reported
6 in the case record suggest that a judgment of equivalence [to a
7 Listing] may be reasonable." SSR 96-6p. In this case, Listing
8 equivalence is not suggested by the evidence in its entirety.

9 The Listings were promulgated by the Commissioner to describe
10 various illnesses and abnormalities, categorized by the various body
11 systems, that are considered severe enough to prevent substantial
12 gainful activity "regardless of age, education or work experience."
13 20 C.F.R. § 404.1525; *Sullivan v. Zebley*, 493 U.S. 521, 529-30
14 (1990). The claimant has the burden of proof at step three.
15 *Roberts v. Shalala*, 66 F.3d 179, 182 (9th Cir. 1995). To show he
16 meets a Listing, the claimant must establish that he meets each
17 criterium of the listed impairment relevant to his claim. *Sullivan*,
18 493 U.S. at 531. If a claimant's impairments do not meet the
19 Listing exactly, a finding of "disabled" may be appropriate if his
20 impairments in combination "equal" a Listing. To prove that he
21 "equals" a Listing, "a claimant must establish symptoms, signs and
22 laboratory findings 'at least equal in severity and duration' to the
23 characteristics of a relevant listed impairment." *Tackett*, 180 F.3d
24 at 1099 (*quoting* 20 C.F.R. § 404.1526). "A claimant cannot qualify
25 for benefits under the 'equivalence' step by showing that the
26 overall functional impact of his unlisted impairment or combination
27 of impairments is as severe as that of a listed impairment."
28

1 Zebley, 493 U.S. at 531. The "functional impact of impairments in
2 combination," regardless of their severity, cannot justify a finding
3 of equivalence. *Id.* at 532.

4 Where a claimant does not meet a Listing, to raise a
5 presumption of disability through equivalence, Plaintiff must
6 present medical evidence of other significant objective medical
7 findings "equal in severity and duration" to the claimed listed
8 impairment, along with the presentation of a cogent argument. See
9 e.g. *Marcia v. Sullivan*, 900 F.2d 172 (9th Cir. 1990)(alternative
10 diagnostic test showing significant findings relating to severity of
11 chronic liver disease presented along with specific theory of
12 medical equivalence). A finding of equivalence is based on medical
13 evidence only. 20 C.F.R. § 404.1529(d)(3), 416.929(d)(3). Absent
14 significant diagnostic medical evidence relating to the same
15 impairment and a plausible theory of equivalence, the ALJ is not
16 required to explain why equivalency is not established. *Lewis v.*
17 *Apfel*, 236 F.3d 503, 514 (9th Cir. 2001); *Gonzalez v. Sullivan*, 914
18 F.2d 1194, 1201 (9th Cir. 1990).

19 At the hearing, Plaintiff's representative asserted Plaintiff
20 met or equaled Listing 1.04 B or C.² (Tr. 34.) On appeal, without
21

22 ² Listing 1.04 is as follows:

23 1.04 *Disorders of the spine* (e.g., herniated nucleus
24 pulposus, spinal arachnoiditis, spinal stenosis,
25 osteoarthritis, degenerative disc disease, facet
26 arthritis, vertebral fracture), resulting in compromise of
a nerve root (including the cauda equina) or the spinal
cord. With:

27 A. Evidence of nerve root compression characterized by
28 neuro-anatomic distribution of pain, limitations of motion
of the spine, motor loss (atrophy with associated muscle
weakness or muscle weakness) accompanied by sensory or

1 identifying which Listing is equaled, Plaintiff makes the conclusory
2 argument that medical evidence of degenerative disk disease of the
3 lumbar spine, vertebral spondylosis, epidural scarring at the S1,
4 nerve root and spinal stenosis in the lumbar spine raise a question
5 of equivalency. (ECF No. 14 at 4.) He argues that the ALJ was
6 obliged to call a medical expert, based on these isolated medical
7 findings, to help identify symptoms and elements that might equal a
8 Listing. (*Id.* at 5.) This conclusory argument is not
9 sufficiently cogent to require the testimony of a medical expert at
10 step three. *Lewis*, 236 F.3d at 514. Further, as discussed below,
11 the objective medical evidence does not establish the severity or
12 duration of a Listing level impairment.

13 For example, review of the entire record shows that in
14 September 2006, neurosurgeon Peter Ward, M.D., identified conditions
15 related to Plaintiff's spine disorder, including mild degenerative
16 disc disease at L3-L4 and severe degenerative disc disease at L5-S1

18 reflex loss and, if there is involvement of the lower
19 back, positive straight-leg raising test (sitting and
supine);

20 or

21 B. Spinal arachnoiditis, confirmed by an operative note or
22 pathology report of tissue biopsy, or by appropriate
23 medically acceptable imaging, manifested by severe burning
or painful dysesthesia, resulting in the need for changes
in position more than once every 2 hours;

24 or

25 C. Lumbar spinal stenosis resulting in pseudoclaudication,
26 established by findings on appropriate medically
27 acceptable imaging, manifested by chronic nonradicular
pain and weakness and resulting in inability to ambulate
effectively as defined in 1.00B2b.

28 20 C.F.R. Pt. 404, Subpt. P, App. 1, 104.

1 causing severe lateral recess stenosis, some nerve root irritation,
2 and paresthesias, "partly related to L5-S1 disc herniation." (Tr.
3 214-16.) Surgical intervention was recommended and performed on
4 October 4, 2006. (Tr. 217-18.) As found by the ALJ, after
5 recommended surgical intervention, Dr. Ward reviewed imaging in
6 March 2007. He noted severe degenerative disk disease at L5-S1,
7 with "a slight bulge of the disk annulus . . . no evidence of
8 recurrent herniated nucleus pulposus, . . . and normal epidural
9 scarring." (Tr. 224.) Follow up with conservative management was
10 recommended. The severe symptoms recorded in therapy progress notes
11 (including poor mobility in walking and the need for a walker) were
12 observed or reported on October 6, 2006, immediately after surgery.
13 (Tr. 219). There is no indication symptoms of this severity
14 persisted. Dr. Ward's physician assistants noted adequate strength
15 and mobility (with poor effort by Plaintiff), unremarkable bilateral
16 straight leg raise, and intact sensation of the calves and feet. A
17 strengthening program and mobility were recommended. (Tr. 222.)
18 Future frequent lifting of more than 30 to 35 pounds was to be
19 avoided. (*Id.*)

20 The record also shows that by March 2007, Plaintiff's treating
21 physician, Ryan Tolley, DO, opined Plaintiff was capable of light
22 duty work. (Tr. 243.) This opinion of Plaintiff's treating medical
23 providers substantially supports the ALJ's step three finding that
24 Plaintiff's impairments neither met nor equaled a Listing. SSR 96-
25 8p, SSR 96-2p (great weight given to uncontradicted treating source
26 medical opinions). Plaintiff has not met his burden to identify
27 significant objective medical findings, along with a cogent
28

1 argument, to raise a presumption of disability at step three.
2 *Lewis*, 236 F.3d at 514. Therefore, the ALJ was not required to call
3 a medical expert or give detailed findings at step three. *Gonzalez*,
4 914 F.2d at 1201.

5 **C. Step Four - Hypothetical Question**

6 Plaintiff contends the ALJ erred at step four by presenting an
7 incomplete hypothetical to the VE. (ECF No. 14 at 5-7.) At step
8 four, the ALJ determines if a claimant can perform his past relevant
9 work. 20 C.F.R. §§ 404.1520(a)(4)(iv),(f), 416.920(a)(4)(iv),(f).
10 Part of the step four evaluation is determining the claimant's RFC,
11 i.e., the most a claimant can still do despite his physical and
12 mental limitations. 20 C.F.R. §§ 404.1545, 416.945. The RFC
13 assessment is not a "medical issue" under the Regulations; it is
14 based on all relevant evidence in the record, not just medical
15 evidence. *Id.*; SSR 96-8p. The RFC determination represents
16 dispositive administrative findings regarding a claimant's ability
17 to perform basic work and may direct the determination of
18 disability. 20 C.F.R. §§ 404.1546, 416.946; SSR 96-5p. At step
19 four, the findings also address the claimant's ability to do past
20 relevant work. 20 C.F.R. §§ 404.1545(a)(5), 416.945(a)(5). Evidence
21 of the physical and mental requirements of a particular job may be
22 found in the Dictionary of Occupational Titles (*DICOT*), other
23 administratively recognized publications, or vocational expert
24 testimony. SSR 82-61. Vocational experts are used most often at an
25 ALJ hearing. SSR 00-4p.

26 Because the RFC assessment is critical to a finding of
27 disability and eligibility for benefits, the final responsibility
28

1 for determining a claimant's RFC rests solely with the Commissioner
2 after consideration of the record in its entirety. *Andrews*, 53 F.3d
3 at 1039; *SSR 96-8p* When RFC findings and final determination
4 reflect a rational interpretation of the evidence, the court may not
5 substitute its judgment for that of the Commissioner. *Tackett*, 180
6 F.3d at 1097.

7 Here, as directed by the Regulations, the ALJ properly took
8 into consideration the objective medical evidence, clinic notes, the
9 treating doctors' opinions, Plaintiff's written reports and credible
10 testimony, and VE testimony. (Tr. 23-26.) 20 C.F.R. §§ 404.1527(e),
11 416.927(e); *SSR 96-5p*; *SSR 96-2p*. The VE's testimony was based on
12 a hypothetical individual's RFC, which reflects those limitations
13 found in the ALJ's final RFC determination. (Tr. 23, 59.) Those
14 limitations are supported fully by the record and Plaintiff's
15 credible testimony.

16 Plaintiff's argument that his subjective complaints evidence
17 greater limitations than reflected in the ALJ's hypothetical to the
18 VE disregards the "clear and convincing" credibility findings by the
19 ALJ. (Tr. 24-26.) The ALJ specifically discounted Plaintiff's
20 allegation that he needed a walker because Plaintiff reported a
21 variety of daily activities that were inconsistent with the claimed
22 severity in Plaintiff's ability to walk. (Tr. 24.) In addition,
23 post-operative therapy notes indicate Plaintiff needed for a walker
24 two days after surgery in October 2006, due to back pain and
25 instability. (Tr. 219-220.) However, on October 31, 2006, the
26 attending neurosurgery provider indicated "I would like [Plaintiff]
27 to wean off of the walker to cane support and eventually without
28 support at this point." (Tr. 220.) Plaintiff presents no further

1 evidence of a prescribed walker in later clinic notes. It is noted
2 on independent review that, in a November 2007 disability report,
3 Plaintiff did not indicate he used a cane or a walker. (Tr. 182.)
4 Further, October 2007 clinic notes indicate Plaintiff exhibited
5 normal gait, normal straight leg raises, and normal muscle strength.
6 (Tr. 265.) At the hearing, Plaintiff testified he used a walker
7 eight months ago, and was told by his doctor to use the walker "when
8 necessary." (Tr. 24, 42.) He testified he used it when he was
9 afraid he would fall; he did not use a walker to get to the hearing.
10 (Tr. 49.) Significantly, as noted above, Plaintiff's treating
11 physician opined he could perform light work with no other
12 restrictions. (Tr. 243.) Substantial evidence supports the ALJ's
13 omission of the need for a walker in the hypothetical.

14 Regarding complaints of pain, the ALJ properly discounted
15 Plaintiff's hearing allegations by referencing inconsistencies with
16 written reports of activities. (Tr. 25-26.) As found by the ALJ,
17 pain could be expected from Plaintiff's musculoskeletal impairments.
18 (Tr. 24.) After referencing objective medical evidence, medical
19 source opinions, inconsistencies between Plaintiff's self-reported
20 daily activities and limitations, and between Plaintiff's complaints
21 and medical evidence, the ALJ reasonably discounted Plaintiff's
22 subjective complaints. *Tommasetti v. Astrue*, 533 F.3d 1035, 1039
23 (9th Cir. 2008). Crediting Plaintiff's pain complaints to a certain
24 degree, the ALJ concluded Plaintiff could no longer do past heavy or
25 medium work, but retained the functional capacity to perform past
26 light level work. (Tr. 23, 26.)

27 This finding is a rational interpretation of the evidence,
28 including Plaintiff's report that his work as a pastor, as performed

1 for eight years, did not require lifting more than 10 pounds and
2 involved visiting people in the community, walking two hours a day,
3 standing three hours a day, and sitting four hours a day. (Tr. 133.)
4 Based on this information (which was in the record reviewed by the
5 VE) and the ALJ's hypothetical individual based on Plaintiff's RFC,
6 the VE opined Plaintiff could perform his past work as a pastor.
7 (Tr. 59.) This testimony is properly considered at step four. 20
8 C.F.R. § 404.1560(b)(2), 416.960(b)(2)(vocation expert opinion,
9 based on hypothetical question, helpful in determining claimant's
10 ability to perform past work). Because the hypothetical contained
11 all limitations supported by substantial evidence and Plaintiff's
12 credible testimony, the ALJ's reliance on this testimony was not
13 error. Accordingly,

14 **IT IS ORDERED:**

15 1. Plaintiff's Motion for Summary Judgment (**ECF No. 13**) is
16 **DENIED;**

17 2. Defendant's Motion for Summary Judgment (**ECF No. 18**) is
18 **GRANTED;**

19 The District Court Executive is directed to file this Order and
20 provide a copy to counsel for Plaintiff and Defendant. Judgment
21 shall be entered for Defendant, and the file shall be **CLOSED**.

22 DATED February 21, 2012.

23
24 S/ CYNTHIA IMBROGNO
25 UNITED STATES MAGISTRATE JUDGE
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27
28